

CHAPTER 59-05 POWERS IN RELATION TO REAL PROPERTY

59-05-01. What powers permitted. Powers in relation to real property are those only which are specified in this chapter.

59-05-02. Power - Definition. A power is an authority to do some act in relation to real property or to the creation or revocation of an estate therein or a charge thereon, which the owner granting or reserving such power might perform for any purpose.

59-05-03. Power of attorney excluded. The provisions of this chapter shall not extend to a simple power of attorney to convey real property in the name of the owner and for the owner's benefit.

59-05-04. Author of a power - Definition. The author of a power is the person by whom a power is created by grant or devise.

59-05-05. Holder of a power - Definition. The holder of a power is the person in whom a power is vested by grant, devise, or reservation.

59-05-06. Powers - Classification. Powers are classified as general, special, beneficial, or in trust.

59-05-07. General power - Definition. A power is general when it authorizes the alienation or encumbrance of a fee in the property embraced therein by a grant, will, or charge in favor of any person whatever.

59-05-08. Special powers - Definition. A power is special:

1. When a person or class of persons is designated to whom the disposition of property under the power is to be made; or
2. When it authorizes the alienation or encumbrance by means of a grant, will, or charge of only an estate less than a fee.

59-05-09. Beneficial powers - Definition. A power is beneficial when no person other than its holder by the terms of its creation has any interest in its execution.

59-05-10. Power in trust - Definition. A power is in trust when any person or class of persons, other than its holder, has by the terms of its creation an interest in its execution.

59-05-11. General power in trust. A general power is in trust when any person or class of persons, other than its holder, is designated as entitled to the proceeds or the disposition or charge authorized by the power or to any portion of the proceeds or other benefits to result from its execution.

59-05-12. Special power in trust. A special power is in trust:

1. When the disposition or charge which it authorizes is limited to be made to any person or class of persons other than the holder of the power; or
2. When any person or class of persons, other than the holder, is designated as entitled to any benefit from the disposition or charge authorized by the power.

59-05-13. Capacity to create a power. No person is capable of creating a power who is not at the same time capable of granting some estate in the property to which the power relates.

59-05-14. Creation of a power. A power may be created only:

1. By a suitable clause contained in a grant of some estate in the real property to which the power relates or in an agreement to execute such a grant; or
2. By a devise contained in a will.

59-05-15. Power vests in whom. A power may be vested in any person.

59-05-16. Reservation of power by grantor. The grantor in any conveyance may reserve to the grantor any power, beneficial or in trust, which the grantor lawfully might grant to another, and every power thus reserved is subject to the provisions of this chapter in the same manner as if granted to another.

59-05-17. When power is irrevocable. Every power, beneficial or in trust, is irrevocable unless an authority to revoke it is given or reserved in the instrument creating the power.

59-05-18. When power is a lien. A power is a lien upon the real property which it embraces from the time the instrument in which it is contained takes effect, except that against creditors, purchasers, and encumbrancers in good faith and without notice from any person having an estate in such real property, the power is a lien only from the time the instrument in which it is contained is duly recorded.

59-05-19. When power deemed part of security. When a power to sell real property is given to a mortgagee or other encumbrancer in an instrument intended to secure the payment of money, the power shall be deemed a part of the security and vests in any person who by assignment becomes entitled to the money so secured to be paid and may be executed by the person whenever the assignment is duly acknowledged and recorded.

59-05-20. Who cannot execute power. A power cannot be executed by any person not capable of disposing of real property.

59-05-21. How power executed. A power can be executed only by a written instrument which would be sufficient to pass the estate or interest intended to pass under the power, if the person executing it were the actual owner.

59-05-22. Execution - By all of several - By survivors. When a power is vested in several persons all must unite in its execution. In case any one or more of them is dead, the power may be executed by the survivor or survivors, unless otherwise prescribed by the terms of the power.

59-05-23. Execution by will. When a power to dispose of real property is confined to a disposition by a devise or will, the instrument of execution must be a will duly executed according to the provisions of chapter 30.1-08.

59-05-24. Execution by grant. When a power is confined to a disposition by grant, it cannot be executed by will even though the disposition is not intended to take effect until after the death of the person executing the power.

59-05-25. Execution by insufficient instrument not void. When the author of a power has directed or authorized it to be executed by an instrument which would not be sufficient in law to pass the estate, the power is not void, but its execution is to be governed by the rules prescribed in this chapter.

59-05-26. Observance of superfluous formalities not necessary. When the author of a power has directed any formalities to be observed in its execution, in addition to those which would be sufficient to pass the estate, the observance of such additional formalities is not necessary to a valid execution of the power.

59-05-27. Nominal conditions disregarded. When the conditions annexed to a power are merely nominal and evince no intention of actual benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded in the execution of the power.

59-05-28. Binding conditions - Court may supply defective execution. With the exceptions contained in this chapter, the intentions of the author of a power as to the mode, time, and conditions of its execution must be observed, subject to the power of a district court to supply a defective execution in the cases provided in sections 59-05-37 and 59-05-57.

59-05-29. Consent of third person - How expressed. When the consent of a third person to the execution of a power is requisite, such consent must be expressed in the instrument by which the power is executed or be certified in writing thereon. In the first case the instrument of execution, in the second, the certificate, must be subscribed by the party whose consent is required, and to entitle the instrument to be recorded such signature must be duly proved or acknowledged according to chapter 47-10 on recording transfers.

59-05-30. Survivors' consent. When the consent of several persons to the execution of a power is requisite, all must consent thereto, but in case any one or more of them is dead, the consent of the survivors is sufficient, unless otherwise prescribed by the terms of the power.

59-05-31. Execution valid without recital of power. Every instrument executed by the holder of a power, conveying an estate or creating a charge which such holder would have no right to convey or create except by virtue of the holder's power, shall be deemed a valid execution of the power, even though not recited or referred to therein.

59-05-32. Requisites for a conveyance - Exceptions. Every instrument except a will in execution of a power, even though the power is one of revocation only, shall be deemed a conveyance within the meaning of chapter 47-10 on recording transfers.

59-05-33. Disposition or charge beyond authority valid. A disposition or charge by virtue of a power more extensive than was authorized thereby is not void, but every estate or interest so created, insofar as it is embraced by the terms of the power, is valid.

59-05-34. Conditions at creation determine legality. No estate or interest can be given or limited to any person by an instrument in execution of a power which could not have been given or limited at the time of the creation of the power.

59-05-35. Grantor reserving revocation deemed owner as to creditors and purchasers. When the grantor in any conveyance reserves to the grantor for the grantor's own benefit an absolute power of revocation, such grantor still is to be deemed the absolute owner of the estate conveyed so far as the rights of creditors and purchasers are concerned.

59-05-36. Time runs from creation of power. Repealed by S.L. 1991, ch. 484, § 6.

59-05-37. Relief of purchasers for valuable consideration. Purchasers for a valuable consideration, claiming under a defective execution of a power, are entitled to the same relief as similar purchasers claiming under a defective conveyance from an actual owner.

59-05-38. Effect of fraud. Instruments in execution of a power are affected by fraud in the same manner as like instruments executed by owners or trustees.

59-05-39. Estates changed into fee. When an absolute power of disposition, not accompanied by any trust, is given to the owner of a particular estate for life or years, such estate is changed into a fee, absolute in favor of creditors, purchasers, and encumbrancers, but subject to any future estates limited thereon, in case the power should not be executed or the property should not be sold for the satisfaction of debts.

59-05-40. Estates - When absolute fee. When an absolute power of disposition, not accompanied by any trust, is given to any person to whom no particular estate is limited, such

person also takes a fee, subject to any future estate that may be limited thereon, but absolute in favor of creditors, purchasers, and encumbrancers.

59-05-41. Estates not limited by a remainder. In all cases when an absolute power of disposition is given, not accompanied by any trust, and no remainder is limited on the estate of the holder of the power, the holder is entitled to an absolute fee.

59-05-42. To devise inheritance is an absolute fee. When a general and beneficial power to devise the inheritance is given to the owner of an estate for life or for years, the owner of the estate is deemed to possess an absolute power of disposition within the meaning of sections 59-05-39, 59-05-40, and 59-05-41.

59-05-43. Power absolute - Disposition during lifetime. Every power of disposition is deemed absolute by means of which the holder in the holder's lifetime is enabled to dispose of the entire fee in possession or in expectancy for the holder's own benefit.

59-05-44. Special or beneficial powers valid during life estate. A special and beneficial power is valid which is granted to the owner of a life estate in the property embraced in the power to make leases, commencing in possession during the owner's life.

59-05-45. Power to lease void as to excess term. A special and beneficial power to make leases of agricultural land for more than ten years or of town or city lots for more than twenty years is void only as to the time beyond ten or twenty years and authorizes leases for those terms or less.

59-05-46. When power to lease transferable. The power of the owner of a life estate to make leases is not transferable as a separate interest but is annexed to the owner's estate and will pass, unless specifically excepted, by any grant of such estate. If specially excepted in any such grant, it is extinguished.

59-05-47. Release by owner - Time of extinguishment of power. The power of the owner of a life estate to make leases may be released by the owner to any person entitled to a future estate in the property and is thereupon extinguished.

59-05-48. Powers enforceable for parties interested. Every trust power, unless its execution is made expressly to depend on the will of the trustees, is imperative and imposes a duty on the trustee, the performance of which may be compelled for the benefit of the parties interested. A trust power does not cease to be imperative when the trustee has the right to select any and exclude others of the persons designated as the beneficiaries of the trust.

59-05-49. Mortgage does not extinguish power - Effects. A mortgage executed by the owner of a life estate having a power to make leases by virtue of any beneficial power does not extinguish or suspend the power, but the power is bound by the mortgage in the same manner as the real property embraced therein. The effects on the power of a lien by mortgage in such case are:

1. The mortgagee is entitled to an execution of the power so far as the satisfaction of the mortgagee's lien may require it.
2. Any subsequent estate created by the owner in execution of the power becomes subject to the mortgage in the same manner as if in terms embraced therein.

59-05-50. When power subject to creditors' claims. Every special and beneficial power is liable to the claims of creditors in the same manner as other interests that cannot be reached by execution and the execution of the power may be adjudged for the benefit of the creditors entitled.

59-05-51. Powers not specified or defined herein void. No beneficial power, general or special, not already specified and defined in this chapter, can be created.

59-05-52. Equal shares when no allotment specification. When a disposition under a power is directed to be made to, among, or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated are entitled to equal proportions.

59-05-53. Discretionary power. When the terms of a power import that the estate or fund is to be distributed among several persons designated in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons in exclusion of the others.

59-05-54. Death of trustee. If the trustee of a power having the right of selection dies, leaving the power unexecuted, its execution shall be adjudged for the benefit equally of all the persons designated as objects of the trust.

59-05-55. District court acts if testator omits to designate trustee. When a power in trust is created by will and the testator has omitted to designate, expressly or by necessary implication, by whom the power is to be executed, its execution devolves on the district court.

59-05-56. Transferable interest - Judgment for creditors or assignees. The execution in whole or in part of any trust power may be adjudged for the benefit of the creditors or assignees of any person entitled as one of the beneficiaries of the trust to compel its execution when the person's interest is transferable.

59-05-57. Execution of power defective - How defect cured. When the execution of a power in trust is defective in whole or in part under the provisions of this chapter, its proper execution may be adjudged in favor of the persons designated as the objects of the trust.

59-05-58. Application of other laws. The provisions of chapters 59-01 and 59-04, saving the rights of other persons from prejudice by the misconduct of trustees and authorizing the court to remove and appoint trustees, the provisions of title 30.1, devolving express trusts upon the court on the death of trustees, and the provisions of section 59-03-17, apply equally to powers in trust and the trustees of such powers.

59-05-59. Subsequent grant is revocation of power. When an absolute power to revoke or modify an instrument affecting the title to or the enjoyment of an estate in real property is reserved to the grantor or given to any other person, a subsequent grant of or charge upon the estate by the person having the power of revocation in favor of a purchaser or encumbrancer for value operates as a revocation of the original instrument to the extent of the power in favor of such purchaser or encumbrancer.